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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSE DE JESUS INIGUEZ, Defendant and Appellant.	B197787 (Los Angeles County Super. Ct. No. NA061212)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles D. Sheldon, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, and Marilee Marshall & Associates for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael R. Johnsen and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Iniguez appeals from the judgment entered following a hearing under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) that resulted from a conditional reversal ordered by this court in *People v. Iniguez* (July 21, 2006, B183543) [nonpub. opn.] (*Iniguez I*). A one-year enhancement under Penal Code section 12022, subdivision (b)(1) was also stricken, as further ordered in *Iniguez I*. Defendant contends that the trial court's *Pitchess* rulings on remand violated his constitutional rights and constituted an abuse of discretion. We affirm.

BACKGROUND

Iniguez I

As set forth in *Iniguez I*: "On May 1, 2004, about 9:00 p.m., Long Beach police Officers Peter Lackovic and Randy Sany received a radio call about a stolen GMC Safari van. When Lackovic called Corina Ramirez, who made the report that her boyfriend defendant had stolen the van, she related that defendant was seen recently driving the van near 49th and Elm in Long Beach. The officers, who were in a marked patrol car, spotted a parked van matching the description given and bearing the license plate of the stolen van. Each officer was wearing a 'raid jacket' that exhibited a police emblem and had the word 'police' on the back.

"With drawn gun, Lackovic approached the van, whose driver's side door was open, and yelled for defendant, who was in the driver's seat, to exit with his hands up. Defendant did not respond and, instead, started the van. Instead of driving straight, defendant accelerated toward Lackovic, and the front of the van struck Lackovic, spinning him to the side. He was pressed against the driver's side as the van drove off. At some point, Lackovic was thrown from the van. Sany [fired ten shots at the fleeing van, and] reported over the radio the officer-involved-shooting and described the van and its direction of travel.

"Meanwhile, Kilimi Leota, Aitui Toa, and Vasa Toa were having a barbecue in the garage area of their East Pleasant Street apartment in Long Beach. After defendant drove up and parked the van in the alley near the area, he related that he had been shot at by police, pointed to the bullet holes in the van, and stated his need for a hiding place. He

changed his clothing and unloaded tools and other items from the van into the garage. Leota repeatedly asked defendant, who stayed a couple of hours, to leave. Vasa surreptitiously telephoned the police and reported defendant's presence, but he left on foot before police arrived.

"A perimeter was set up to apprehend defendant. As uniformed Officer Timothy O'Hara and Detective Carl Nydell pursued him, defendant ran in the direction of uniformed Officer Mark Steenhausen, who blocked his path by standing with his baton held in the instructed 'upper cradle position' across his chest. Without slowing, defendant, who held a 15-inch socket wrench in his right hand and a screwdriver in his left, ran toward Steenhausen, 'windmill[ing]' his arms. Steenhausen fell backward to avoid being hit by the wrench, which came within inches of his head. As defendant ran diagonally across the street toward an alley, O'Hara grabbed his shoulder. Defendant turned and swung the wrench within inches of O'Hara's face as his head went back and he let go of defendant.

"Afterwards, Nydell and O'Hara together tackled defendant as he ran into the alley. Defendant failed to comply with demands to show his hands and resisted being handcuffed. O'Hara attempted to place defendant's right arm into a 'twist lock' to force his arm outward, and Steenhausen 'jabbed' defendant in the upper thigh to get him to show his hands. Nydell denied striking defendant or seeing any other officer do so. O'Hara denied taking out his baton or striking defendant. He also denied seeing anyone using a baton or an officer punch or kick defendant, but he did see 'somebody' strike defendant but not where. Steenhausen denied striking defendant's head, punching or kicking him or seeing any other officer do so. After defendant was detained, Steenhausen saw a cut on defendant's head but did not know how it happened.

"At trial, defendant did not testify. The defense presented photographic evidence of the bullet holes in the van; evidence that the officer who fell was the one who took out a gun and fired at the fleeing van; and evidence to establish both that Lackovic's injuries were insubstantial and that a van striking a person would cause visible damage to the van and substantial injuries to the person." (*Iniguez I, supra*, B183543 at pp. 3–4.)

Based on the above, a jury found defendant guilty of two counts of assault on a peace officer (Steenhausen and O'Hara) while personally using a dangerous weapon. The jury was unable to reach a verdict on the allegation that defendant had assaulted Lackovic, but defendant later entered a no contest plea to that charge and was sentenced to an aggregate prison term of six years four months. On appeal, the Attorney General conceded that a one-year use enhancement on defendant's conviction of assaulting Officer Steenhausen should be stricken. (*Iniguez I*, *supra*, B183543 at p. 3.) With respect to a *Pitchess* issue raised by defendant, we stated as follows:

"Defendant contends the trial court improperly limited *Pitchess* discovery to excessive force complaints and against only two of the officers, Steenhausen and O'Hara. We agree and remand for a new *Pitchess* hearing.

"In his pretrial *Pitchess* motion defendant sought discovery of any citizen complaints against Lackovic, Sany, Steenhausen, O'Hara, and Jesus Fragosa with regard to misconduct involving excessive force, bias, dishonesty, coercive conduct, or acts that violated the statutory or constitutional rights of others. '[B]ias' referred to conduct 'displaying a personal or other bias related to the race, gender, or sexual orientation of another person.' '[D]ishonesty' was defined as conduct that was 'dishonest or displaying moral turpitude, such as false arrest, fabrication of evidence or probable cause, filing or writing false police reports, perjury, planting evidence or using false police reports to cover up the use of excessive force, improper police tactics, or making false or misleading internal reports such as false overtime or false medical reports.'

"In his supporting declaration, Robert Conley, defendant's appointed counsel, stated he was making the 'declaration upon information and belief . . . .' With regard to the events surrounding defendant's detention, counsel stated defendant 'alleges that he was beaten about the head with batons and/or flashlights repeatedly while being detained — which is the real cause of his head wound and some of his facial cuts.' He further stated that 'O'Hara and Steenhausen were both involved in using force against Defendant. Steenhausen admitted striking Defendant with his baton in preliminary hearing testimony. O'Hara is the first officer to grab the Defendant at the time [he] was

taken to the ground, according to the police reports. Detectives Nydell and Fragosa were also involved in taking [him] to the ground and the ensuing struggle, according to Nydell's police report.' He asserted the listed officers also 'have written false police reports in the past and are therefore prone to perjury.' In conclusion, counsel stated, 'O'Hara, Steenhausen, Nydell and Fragosa simply gave Defendant a thorough beating (obviously using dangerous and deadly weapons in the process) and then lied about Defendant's actions in an attempt to obscure and/or excuse their beating of Defendant.'

"The trial court allowed *Pitchess* discovery only as to excessive force complaints against Steenhausen and O'Hara. This was reversible error. The court should have allowed discovery regarding excessive force complaints also against Nydell and Fragosa and as well as complaints against all four officers involving claims of dishonesty, including perjury and filing of false police reports. Such additional discovery was warranted based on the declaration of defendant's attorney, which met the criteria for such discovery set forth in *Warrick v. Superior Court* (2005) 35 Cal.4th 1011. (See, e.g., *People v. Hustead* (1999) 74 Cal.App.4th 410, 416–417 [allegations in defense counsel's declaration sufficient for *Pitchess* discovery of whether officer had history of misstating or fabricating facts in police reports]; *Larry E. v. Superior Court* (1987) 194 Cal.App.3d 25, 32 [discovery allowed of personnel records of all officers directly involved in fracas with defendant regardless of whether officers named as victims]; cf. *Hinojosa v. Superior Court* (1976) 55 Cal.App.3d 692, 697 ['character of the officers . . . not directly involved in the fracas . . . not sufficiently relevant to the defense to warrant intrusion into those policemen's confidential files'].)" (*Iniguez I*, *supra*, B183543 at pp. 12–14.)

The *Iniguez I* opinion concluded as follows: "The judgment is reversed, and the matter is remanded with directions that the superior court hold a new *Pitchess* hearing in accordance with the views expressed in this opinion. If any complaint regarding dishonesty, including perjury or filing of a false police report, or any additional complaint of excessive force is discovered and the earlier nondisclosure of such complaint or complaints prejudiced defendant's trial, the judgment is reversed as to counts 3 and 4 [assault on Officers Steenhausen and O'Hara] with directions to turn over the relevant

matters discovered and hold a new trial as to those counts only. Otherwise, defendant's sentence is modified by striking the one-year use enhancement (Pen. Code, § 12022, subd. (b)(1)) on count 3 [assault on Officer Lackovic], and as modified, the judgment is affirmed, and the superior court is directed to prepare an amended abstract of judgment accordingly." (*Iniguez I, supra*, B183543 at p. 15.)

Proceedings on Remand

On August 25, 2006, the trial court conducted an *in camera* review under *Pitchess* in accordance with the requirements of *Iniguez I*.[1] On August 31 discovery was provided to defendant, which defense counsel described as consisting of nine complaints involving approximately 33 civilian witnesses.

On October 6, 2006, defendant filed a motion for a 30-day continuance of any *post*-appeal motions. At a hearing on that date, counsel stated that although he had contacted "three of the major witnesses," more information was needed from them. In addition, addresses and phone numbers provided for other witnesses did not appear valid. Defendant's motion was granted and the matter was continued to November 7.

On November 6, 2006, defendant filed a motion requesting a continuance to November 29, supported by counsel's declaration stating that he was engaged in a lengthy preliminary hearing and that defendant had not yet been delivered to local custody. At a hearing on November 14, the matter was continued to December 4.

On December 5, 2006, defendant filed a "Statement of Prejudice." Counsel declared that in an attempt to locate witnesses he had made over 25 telephone calls, mailed 12 letters, and spent approximately four hours on computer search engines trying to locate witnesses. Nevertheless, "most of the witnesses regarding [the *Pitchess*] complaints have moved and changed telephone numbers. The defense would like to file

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[1] We have reviewed the sealed *Pitchess* transcript of that hearing. Based on that review, we conclude that the trial court's rulings at the hearing were proper. (*Pitchess, supra*, 11 Cal.3d at p. 535; *People v. Mooc* (2001) 26 Cal.4th 1216, 1232.)

a supplemental *Pitchess* motion for updated telephone numbers and addresses. Additionally, the defense would like to have the date of birth of the *Pitchess* witnesses." Based on information from the witnesses who had been contacted, defendant argued that he had been prejudiced by the failure to provide proper *Pitchess* discovery to the defense.

At a hearing on December 5, 2006, defense counsel reiterated his need for more time, stating that a "supplemental *Pitchess* usually takes 21 days." The trial court ruled that defendant had not shown good cause to continue what the court characterized as defendant's motion for a new trial. Further proceedings were set for December 19.

On December 19, 2006, defendant noted that although two *Pitchess* witnesses would testify, other witnesses could not be contacted due to the inadequacy of the information provided in discovery. The court stated, "We talked about that before. It's been an awfully long time. Frankly, I think you have been very diligent from everything you have told me and from knowing you in the past. You can only do so much. You're given the information, and some people are findable and available and some aren't. So I do feel we should go forward at this time with whatever you have to present . . . ."

As the hearing went forward, Larry Boone testified that in December 2002 Officer Nydell and another officer wrongfully arrested him for possession of cocaine. Boone entered a guilty plea and his case was disposed of under Proposition 36. Boone had previously been convicted of burglary, armed robbery, and possession of cocaine.

Elroy Johnson testified that in May 2003 Officer Steenhausen appeared at his home without providing an explanation, detained him in handcuffs, and searched his home without giving him a reason for doing so. During the detention, Steenhausen approached with a baton as if to strike Johnson. Johnson was later charged with violating Penal Code section 148 but was acquitted of the charge. As a result of the incident, Johnson brought a federal civil rights action against the Long Beach Police Department. The matter went to trial, at which Steenhausen testified. The trial resulted in a verdict in favor of the police department. Defense counsel further asked Johnson about the substance of Steenhausen's testimony at the federal trial and the prosecutor objected. The objection was sustained, but the court agreed to continue the matter to January 19,

2007, to give defendant time to obtain a transcript of the trial or Steenhausen's police report, adding that "if something else comes up, you can bring it in."

The January 19 hearing was continued three times and ultimately was conducted on February 26, 2007. At the hearing, defendant stated that there was no transcript of Steenhausen's testimony in the Johnson federal civil rights action. Defendant did not subpoena Steenhausen for the *Pitchess* hearing. But for the purpose of proving Steenhausen's predilection for perjury, defendant offered that Johnson would testify as to the nature of Steenhausen's testimony at the federal trial and then further asserted that Steenhausen's federal testimony was false. The prosecutor objected on hearsay grounds to evidence regarding Steenhausen's federal testimony. The objection was sustained.

Following that ruling the matter was argued. The court found that the earlier nondisclosure of the *Pitchess* material had not prejudiced defendant.

DISCUSSION

Defendant first contends that the trial court prejudicially abused its discretion when, on December 5, 2006, it refused to continue the matter for 21 days to allow defendant to file a supplemental *Pitchess* motion. Defendant is correct that witnesses might have been easier to contact had all the discovery to which he was entitled under *Pitchess* been provided at the time of the initial *in camera* review. Nevertheless, several continuances of the hearing on remand were granted at defendant's request, and the hearing was not completed until almost six months after the additional *Pitchess* discovery was turned over to defendant. The court was on solid footing in concluding that additional time would not provide any benefit to defendant and in proceeding with the hearing on prejudice. Accordingly, defendant's contention must be rejected. (See *People v. Beeler* (1995) 9 Cal.4th 953, 1003.)

Defendant also asserts that because witnesses could not be located, disclosure of verbatim police reports was required to assist defendant in further efforts to locate missing witnesses. But defendant did not make a timely request for these reports. In addition, the record on appeal does not identify the nature and contents of the *Pitchess* discovery that was turned over to defendant, who has thus failed in his obligation to

provide an adequate record to permit appellate review. (See *People v. Gordon* (1990) 50 Cal.3d 1223, 1250, overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

Nor was the trial court's ruling adversely affected by its refusal to allow defendant to present evidence of Johnson's version of Steenhausen's federal testimony. Johnson was able to testify fully as to his version of events. And because defendant did not subpoena Steenhausen, the court had no opportunity to judge Steenhausen's credibility as a witness. The court, having viewed Johnson's testimony and been informed that the civil rights action was resolved adversely to Johnson, did not abuse its discretion in determining that defendant's trial had not been prejudiced by the failure to provide pretrial *Pitchess* discovery on this issue.

In sum, defendant has failed to demonstrate that the trial court violated defendant's constitutional rights or abused its discretion in failing to grant a new trial.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

WEISBERG, J.*

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* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.